Bristol Farms *and* Konny Renteria. Case 21–CA–103030

July 6, 2016

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS MISCIMARRA AND MCFERRAN

On October 17, 2014, Administrative Law Judge Lisa Thompson issued the attached decision. The General Counsel filed limited exceptions and a supporting brief, and the Respondent filed an answering brief. The Respondent filed exceptions and a supporting brief, the General Counsel filed an answering brief, and the Respondent filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The judge found, applying the Board's decision in *D. R. Horton*, 357 NLRB 2277 (2012), enf. denied in relevant part, 737 F.3d 344 (5th Cir. 2013), that the Respondent violated Section 8(a)(1) of the Act by maintaining and enforcing an arbitration agreement that requires employees, as a condition of employment, to waive their rights to pursue class or collective actions involving employment-related claims in all forums, whether arbitral or judicial.[1] In *Murphy Oil USA, Inc.*, 361 NLRB No. 72 (2014), enf. denied in relevant part, 808 F.3d 1013 (5th Cir. 2015), the Board reaffirmed the relevant holdings of *D. R. Horton*, supra. The judge also found, relying on *Lafayette Park Hotel*, 326 NLRB 824 (1998), enfd. 203 F.3d 52 (D.C. Cir. 1999), and *Cintas Corp. v. NLRB*, 482 F.3d 463 (D.C. Cir. 2007), that maintaining the Agreement violated Section 8(a)(1) because employees reasonably would believe that it bars or restricts their right to file unfair labor practice charges with the Board.

The Board has considered the decision and the record in light of the exceptions and briefs[2] and, based on the judge's application of *D. R. Horton* and on our subsequent decision in *Murphy Oil*, has decided to affirm the judge's findings and conclusions,[3] and adopt the recommended Order as modified and set forth in full below.[4]

[1] See also *Lewis v. Epic Systems*, ___ F.3d ___ (7th Cir. May 26, 2016) (holding mandatory individual arbitration agreement that did not permit collective action in any forum violates the Act and is also unenforceable under the Federal Arbitration Act, 19 U.S.C. §§1, et seq.).

[2] The Respondent has requested oral argument. The request is denied as the record and briefs adequately present the issues and the positions of the parties.

[3] In rejecting the Respondent's argument that the complaint was not validly issued because the Board lacked a quorum at the time it approved the appointment of Olivia Garcia as Regional Director for Region 21, we rely on *Covenant Care California, LLC*, 363 NLRB No. 80, slip op. at 1 fn. 2 (2015) (Although Director Garcia's appointment was announced on January 6, 2012, the Board approved her appointment on December 22, 2011, at which time it had a valid quorum).

The Respondent contends that the arbitration agreement is silent on the matter of class or collective arbitration, and therefore would not be read to restrict collective activity under the test set forth in *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 647 (2004). Nevertheless, we agree with the judge that the Respondent has applied the agreement to restrict Sec. 7 rights under the third prong of *Lutheran Heritage* by filing a motion to compel individual arbitration of the Charging Party's class-wide claims, and is thus unlawful. See *Countrywide Financial Corp.*, 362 NLRB No. 165, slip op. at 3–5 (2015); *Leslie's Poolmart, Inc.*, 362 NLRB No. 184, slip op. at 1 fn. 3 (2015); *Philmar Care, LLC, d/b/a San Fernando Post Acute Hospital*, 363 NLRB No. 57, slip op. at 1 (2015).

For the reasons stated by the judge, we agree that employees reasonably would construe the Agreement to restrict their access to the Board's processes. See *U-Haul Co. of California*, 347 NLRB 375, 377–378 (2006), enfd. 255 Fed. Appx. 527 (D.C. Cir. 2007); *Chesapeake Energy Corp.*, 362 NLRB No. 80, slip op. at 2 (2015), enfd. in relevant part 633 Fed. Appx. 613 (5th Cir. Feb. 12, 2016); *SolarCity Corporation*, 363 NLRB No. 83, slip op. at 4–6 (2015). In his partial dissent, our colleague repeats his argument that an individual arbitration agreement lawfully may require the arbitration of unfair labor practice claims if the agreement reserves to employees the right to file charges with the Board. As explained in *Ralph's Grocery Co.*, 363 NLRB No. 128, slip op. at 3 (2016), that argument is at odds with well-established Board law.

The Respondent has also excepted to the judge's finding that the Agreement was a mandatory condition of employment for Charging Party Konny Renteria and other employees, contending that its arbitration agreement is voluntary and therefore does not fall within the proscriptions of *Murphy Oil* and *D. R. Horton*, supra. See *D. R. Horton*, slip op. at 13 fn. 28. We agree with the judge that the Agreement was imposed on Renteria as a condition of employment, as Renteria's job application stated that any offer of employment was conditioned on her agreeing to enter into the Agreement. The dissent asserts that "[t]he Agreement was voluntarily signed by Renteria, even though, at the time, the Respondent was willing to hire employees or continue their employment only if they entered into the Agreement." Whether or not the Agreement could be described as voluntary in some sense is irrelevant for purposes of Board law. The agreement was a mandatory condition of employment, as our colleague acknowledges, and thus falls under *D. R. Horton*. In any event, the Board holds that an arbitration agreement that, as applied, precludes collective action in all forums is unlawful even if not a mandatory condition of employment, because it requires employees to prospectively waive their Sec. 7 right to engage in concerted activity. See *Haynes Building Services*, 363 NLRB No. 125, slip op. at 3 fn. 12 (2016); *Bristol Farms*, 363 NLRB No. 45 (2015); *On Assignment Staffing Services*, 362 NLRB No. 189, slip op. at 1, 5–8 (2015), enf. denied No. 15-60642 (5th Cir. June 6, 2016).

Our dissenting colleague, relying on his dissenting position in *Murphy Oil*, 361 NLRB No. 72, slip op. at 22–35 (2014), would find that the Respondent's Agreement does not violate Sec. 8(a)(1). He observes that the Act does not "dictate" any particular procedures for the litigation of non-NLRA claims, and "creates no substantive right for employees to insist on class-type treatment" of such claims. This is all surely correct, as the Board has previously explained in *Murphy Oil*, above, slip op. at 2, and *Bristol Farms*, 363 NLRB No. 45, slip op. at 2 & fn. 2 (2015). But what our colleague ignores is that the Act "does create a right to *pursue* joint, class, or collective claims if and as available, without the interference of an employer-imposed restraint." *Mur-*

ORDER

The National Labor Relations Board orders that the Respondent, Bristol Farms, Los Angeles, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining an arbitration agreement that employees reasonably would believe bars or restricts the right to file charges with the National Labor Relations Board.

(b) Maintaining and/or enforcing an arbitration agreement that requires employees to waive the right to maintain employment-related class or collective actions in all forums, whether arbitral or judicial.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind the arbitration agreement in all of its forms, or revise it in all of its forms to make clear to employees that the arbitration agreement does not constitute a waiver of their right to maintain employment-related joint, class, or collective actions in all forums, and that it does not bar or restrict employees' right to file charges with the National Labor Relations Board.

(b) Notify all current and former employees who were required to sign or otherwise become bound to the arbitration agreement in any form that it has been rescinded or revised and, if revised, provide them a copy of the revised agreement, and further notify them that the agreement will not be enforced in a manner that compels them to waive their right to maintain employment-related joint, class or collective actions in all forums.

(c) Notify the Superior Court of California, City of Los Angeles, in Case No. BC491186, that it has rescinded or revised the arbitration agreement upon which it based its motion to dismiss Konny Renteria's collective lawsuit and compel individual arbitration of her claims, and inform the court that it no longer opposes the lawsuit on the basis of the agreement.

(d) In the manner set forth in this decision, reimburse Konny Renteria and any other plaintiffs in Case No. BC491186 for any reasonable attorneys' fees and litigation expenses that they may have incurred in opposing the Respondent's motion dismiss the collective lawsuit and compel individual arbitration.

(e) Within 14 days after service by the Region, post at its Carson, California copies of the attached notice marked "Appendix A" and at all other facilities where the unlawful agreement is or has been if effect, copies of the attached notice marked "Appendix B."[5] Copies of the notice, on forms provided by the Regional Director for Region 21, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distrib-

phy Oil, above, slip op. at 2 (emphasis in original). The Respondent's Agreement is just such an unlawful restraint.

Likewise, for the reasons explained in *Murphy Oil* and *Bristol Farms*, there is no merit to our colleague's view that finding the Agreement unlawful runs afoul of employees' Sec. 7 right to "refrain from" engaging in protected concerted activity. See *Murphy Oil*, above, slip op. at 18; *Bristol Farms*, above, slip op. at 2. Nor is he correct in insisting that Sec. 9(a) of the Act requires the Board to permit individual employees to prospectively waive their Sec. 7 right to engage in concerted legal activity. See *Murphy Oil*, above, slip op. at 17–18; *Bristol Farms*, above, slip op. at 2.

Further, we reject the position of the Respondent and our dissenting colleague that the Respondent's motion to compel arbitration was protected by the First Amendment's Petition Clause. In *Bill Johnson's Restaurants v. NLRB*, 461 U.S. 731 (1983), the Court identified two situations in which a lawsuit enjoys no such protection: where the action is beyond a State court's jurisdiction because of Federal preemption, and where "a suit . . . has an objective that is illegal under federal law." 461 U.S. at 737 fn. 5. Thus, the Board may properly restrain litigation efforts such as the Respondent's motion to compel arbitration that have the illegal objective of limiting employees' Sec. 7 rights and enforcing an unlawful contractual provision, even if the litigation was otherwise meritorious or reasonable. See *Murphy Oil*, supra, slip op. at 20–21; *Convergys Corp.*, 363 NLRB No. 51, slip op. at 2 fn. 5 (2015).

[4] Consistent with our decision in *Murphy Oil*, supra, at 21, and the General Counsel's exceptions, we shall order the Respondent to reimburse Konny Renteria and any other plaintiffs for all reasonable expenses and legal fees, with interest, that they incurred in opposing the Respondent's unlawful motion in the Superior Court of California, City of Los Angeles, to compel arbitration of their class or collective claims. See *Bill Johnson's Restaurants v. NLRB*, 461 U.S. at 747 ("If a violation is found, the Board may order the employer to reimburse the employees whom he had wrongfully sued for their attorneys' fees and other expenses" as well as "any other proper relief that would effectuate the policies of the Act."). Interest shall be computed in the manner prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). See *Teamsters Local 776 (Rite Aid),* 305 NLRB 832, 835 fn. 10 (1991) ("[I]n make-whole orders for suits maintained in violation of the Act, it is appropriate and necessary to award interest on litigation expenses"), enfd. 973 F.2d 230 (3d Cir. 1992).

We shall also amend the judge's remedy to order the Respondent to notify the Superior Court of California, City of Los Angeles, in Case No. BC491186, that it has rescinded or revised the arbitration agreement and to inform the court that it no longer opposes Renteria's lawsuit on the basis of the arbitration agreement.

Finally, we shall modify the judge's recommended Order to conform to the amended remedy and to the Board's standard remedial language, and we shall substitute a new notice to conform to the Order as modified.

[5] If this Order is enforced by a judgment of a United States court of appeals, the words in the notices reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

uted electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice marked "Appendix A" to all current employees and former employees employed by the Respondent at any time since October 17, 2012, and any current or former employees against whom the Respondent has enforced its mandatory arbitration agreement since October 17, 2012. If the Respondent has gone out of business or closed any facilities other than the one involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice marked "Appendix B" to all current employees and former employees employed by the Respondent at those facilities at any time since October 17, 2012.

(f) Within 21 days after service by the Region, file with the Regional Director for Region 21 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. July 6, 2016

Mark Gaston Pearce, Chairman

Lauren McFerran, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER MISCIMARRA, concurring in part and dissenting in part.

In this case, my colleagues find that the Respondent's Mutual Agreement to Arbitrate (Agreement) violates Section 8(a)(1) of the National Labor Relations Act (the Act or NLRA) because the Agreement waives the right to participate in class or collective actions regarding non-NLRA employment claims.[1] Konny Renteria signed the Agreement, and later she filed a class action lawsuit against the Respondent in state court alleging wage-and-hour and other violations under the California Labor Code and California Industrial Welfare Commission Wage Orders**.** In reliance on the Agreement, the Respondent filed a motion to dismiss Renteria's class-wide claims and compel individual arbitration, and the court granted the motion. My colleagues find that the Respondent thereby unlawfully enforced its Agreement. I respectfully dissent from these findings for the reasons explained in my partial dissenting opinion in *Murphy Oil USA, Inc.*[2] For the reasons stated below, however, I concur in finding that the Agreement violates Section 8(a)(1) on the basis that it unlawfully interferes with NLRB charge filing.

1. *Alleged Interference with Class Action Participation.* I agree that an employee may engage in "concerted" activities for "mutual aid or protection" in relation to a claim asserted under a statute other than NLRA.[3] However, Section 8(a)(1) of the Act does not vest authority in the Board to dictate any particular procedures pertaining to the litigation of non-NLRA claims, nor does the Act render unlawful agreements in which employees waive class-type treatment of non-NLRA claims. To the contrary, as discussed in my partial dissenting opinion in *Murphy Oil*, NLRA Section 9(a) protects the right of every employee as an "individual" to "present" and "adjust" grievances "at any time."[4] This aspect of Section

[1] I agree with my colleagues that Regional Director Garcia was appointed by a Board that had a valid quorum and that the complaint in this case was validly issued. However, I believe this case should have been disposed of last year, when the Respondent proposed a settlement agreement that included implementing a revised arbitration agreement. The revised arbitration agreement included, among other things, language that made signing the arbitration agreement *entirely optional*. Nonetheless, my colleagues rejected the Respondent's proposed settlement agreement. See *Bristol Farms*, 363 NLRB No. 45, slip op. at 1–2 (2015). I would have approved it. Id., slip op. at 2–4 (Member Miscimarra, dissenting).

[2] 361 NLRB No. 72, slip op. at 22–35 (2014) (Member Miscimarra, dissenting in part). The Board majority's holding in *Murphy Oil* invalidating class-action waiver agreements was denied enforcement by the Court of Appeals for the Fifth Circuit. *Murphy Oil USA, Inc. v. NLRB*, 808 F.3d 1013 (5th Cir. 2015).

[3] I agree that non-NLRA claims can give rise to "concerted" activities engaged in by two or more employees for the "purpose" of "mutual aid or protection," which would come within the protection of NLRA Sec. 7. See *Murphy Oil*, 361 NLRB No. 72, slip op. at 23–25 (Member Miscimarra, dissenting in part). However, the existence or absence of Sec. 7 protection does not depend on whether non-NLRA claims are pursued as a class or collective action, but on whether Sec. 7's statutory requirements are met—an issue separate and distinct from whether an individual employee chooses to pursue a claim as a class or collective action. Id.; see also *Beyoglu*, 362 NLRB No. 152, slip op. at 4–5 (2015) (Member Miscimarra, dissenting).

[4] *Murphy Oil*, above, slip op. at 30–34 (Member Miscimarra, dissenting in part). Sec. 9(a) states: "Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: Provided, That *any indi-*

9(a) is reinforced by Section 7 of the Act, which protects each employee's right to "refrain from" exercising the collective rights enumerated in Section 7. Thus, I believe it is clear that (i) the NLRA creates no substantive right for employees to insist on class-type treatment of non-NLRA claims;[5] (ii) a class-waiver agreement pertaining to non-NLRA claims does not infringe on any NLRA rights or obligations, which has prompted the overwhelming majority of courts to reject the Board's position regarding class-waiver agreements;[6] and (iii) enforcement of a class-action waiver as part of an arbitration agreement is also warranted by the Federal Arbitration Act (FAA).[7] Although questions may arise regarding the enforceability of particular agreements that waive class or collective litigation of non-NLRA claims, I believe these questions are exclusively within the province of the court or other tribunal that, unlike the NLRB, has jurisdiction over such claims.[8]

Because I believe the Respondent's Agreement was lawful under the NLRA, I would find it was similarly lawful for the Respondent to file a motion in state court seeking to enforce the Agreement.[9] It is relevant that the state court that had jurisdiction over the non-NLRA claims *granted* the Respondent's motion to compel arbitration. That the Respondent's motion was reasonably based is also supported by court decisions that have en-

vidual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: Provided further, That the bargaining representative has been given opportunity to be present at such adjustment" (emphasis added). The Act's legislative history shows that Congress intended to preserve every individual employee's right to "adjust" any employment-related dispute with his or her employer. See *Murphy Oil*, above, slip op. at 31–32 (Member Miscimarra, dissenting in part).

[5] When courts have jurisdiction over non-NLRA claims that are potentially subject to class treatment, the availability of class-type procedures does not rise to the level of a substantive right. See *D. R. Horton, Inc. v. NLRB*, 737 F.3d 344, 362 (5th Cir. 2013) ("The use of class action procedures . . . is not a substantive right.") (citations omitted), petition for rehearing en banc denied No. 12–60031 (5th Cir. 2014); *Deposit Guaranty National Bank v. Roper*, 445 U.S. 326, 332 (1980) ("[T]he right of a litigant to employ Rule 23 is a procedural right only, ancillary to the litigation of substantive claims.").

[6] The Fifth Circuit has repeatedly denied enforcement of Board orders invalidating mandatory arbitration agreements that waived class-type treatment of non-NLRA claims. See, e.g., *Murphy Oil, Inc., USA v. NLRB*, above; *D. R. Horton, Inc. v. NLRB*, above. The overwhelming majority of courts considering the Board's position have likewise rejected it. See *Murphy Oil*, above, slip op. at 34 (Member Miscimarra, dissenting in part); id., slip op. at 36 fn. 5 (Member Johnson, dissenting) (collecting cases); see also *Patterson v. Raymours Furniture Co., Inc.*, 96 F. Supp. 3d 71 (S.D.N.Y. 2015); *Nanavati v. Adecco USA, Inc.*, 99 F. Supp. 3d 1072 (N.D. Cal. 2015), motion to certify for interlocutory appeal denied 2015 WL 4035072 (N.D. Cal. June 30, 2015); *Brown v. Citicorp Credit Services, Inc.*, No. 1:12-cv-00062-BLW, 2015 WL 1401604 (D. Idaho Mar. 25, 2015) (granting reconsideration of prior determination that class waiver in arbitration agreement violated NLRA); *Bell v. Ryan Transportation Service, Inc.*, No. 15-9857-JWL, 2016 WL 1298083 (D. Kan. Mar. 31, 2016); but see *Lewis v. Epic Systems Corp.*, No. 15-2997, 2016 WL 3029464 (7th Cir. May 26, 2016); *Totten v. Kellogg Brown & Root, LLC*, No. ED CV 14-1766 DMG (DTBx), 2016 WL 316019 (C.D. Cal. Jan. 22, 2016).

[7] For the reasons expressed in my *Murphy Oil* partial dissent and those thoroughly explained in former Member Johnson's dissent in *Murphy Oil*, the FAA requires that the arbitration agreement be enforced according to its terms. *Murphy Oil*, above, slip op. at 34 (Member Miscimarra, dissenting in part); id., slip op. at 49–58 (Member Johnson, dissenting).

[8] The Agreement was voluntarily signed by Renteria, even though, at the time, the Respondent was willing to hire employees or continue their employment only if they entered into the Agreement. For my colleagues, however, the voluntariness of a class-action waiver is immaterial. See *On Assignment Staffing Services*, 362 NLRB No. 189 (2015) (finding class-action waiver agreement unlawful even where employees are free to opt out of the agreement), revd. No. 15-60642 (5th Cir. June 6, 2016) (per curiam); *Bristol Farms*, above (finding class-action waiver agreement unlawful even where employees must affirmatively opt *in* before they will be covered by a class-action waiver agreement, and where they are free to decline to do so). I disagree. By definition, every agreement sets forth terms upon which each party may insist as a condition to entering into the relationship governed by the agreement. Thus, conditioning employment on the execution of a class-action waiver does not make it involuntary. However, the Board's position is even less defensible when the Board finds that NLRA "protection" operates in reverse—not to *protect* employees' rights to engage or refrain from engaging in certain kinds of collective action, but to *divest* employees of those rights by denying them the right *to choose* whether to be covered by an agreement to litigate non-NLRA claims on an individual basis. See *Bristol Farms*, above, slip op. at 2–4 (Member Miscimarra, dissenting).

[9] The Agreement is silent as to whether arbitration may be conducted on a class or collective basis. For the reasons stated in former Member Johnson's dissent in *Countrywide Financial Corp.*, 362 NLRB No. 165, slip op. at 8–10 (2015), and in my dissent in *Philmar Care, LLC,* 363 NLRB No. 57, slip op. at 4 fn. 11 (2015), finding that the Respondent's efforts to compel individual arbitration violated the Act is in conflict with the FAA and Supreme Court precedent construing that statute. The Court has held that a "party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party agreed to do so." *Stolt-Nielsen S.A. v. Animal Feeds International Corp.*, 559 U.S. 662, 684–685 (2010) (emphasis in original). Obviously, where an arbitration agreement is silent regarding class arbitration, there is no such contractual basis. Thus, Respondent's motion to compel individual arbitration "was well-founded in the FAA as authoritatively interpreted by the Supreme Court." *Philmar Care, LLC,* above (Member Miscimarra, dissenting).

As I explain below, I concur in my colleagues' finding that the Agreement unlawfully interfered with the right of employees to allege a violation of the NLRA through the filing of an unfair labor practice charge with the NLRB. However, the unlawfulness of the Agreement in this regard is not material to the merits of the Respondent's state court petition to compel the Charging Party to arbitrate her non-NLRA claims. See *Fuji Food Products, Inc.*, 363 NLRB No. 118, slip op. at 4, 4–5 fn. 13 (2016) (Member Miscimarra, concurring in part and dissenting in part) (finding that employer lawfully enforced class-waiver agreement by filing motion to compel arbitration of non-NLRA claims, notwithstanding additional finding that agreement unlawfully interfered with Board charge filing).

forced similar agreements.[10] As the Fifth Circuit observed after rejecting (for the second time) the Board's position regarding the legality of class-waiver agreements: "[I]t is a bit bold for [the Board] to hold that an employer who followed the reasoning of our *D. R. Horton* decision had no basis in fact or law or an 'illegal objective' in doing so. The Board might want to strike a more respectful balance between its views and those of circuit courts reviewing its orders."[11] I also believe that any Board finding of a violation based on the Respondent's meritorious state court motion to compel arbitration would improperly risk infringing on the Respondent's rights under the First Amendment's Petition Clause. See *Bill Johnson's Restaurants v. NLRB*, 461 U.S. 731 (1983); *BE & K Construction Co. v. NLRB*, 536 U.S. 516 (2002); see also my partial dissent in *Murphy Oil*, above, 361 NLRB No. 72, slip op. at 33–35. Finally, for similar reasons, I believe the Board cannot properly require the Respondent to reimburse the Charging Party and any other plaintiffs for their attorneys' fees in the circumstances presented here. *Murphy Oil*, above, 361 NLRB No. 72, slip op. at 35.

2. *Alleged Interference with NLRB Charge Filing.* For the following reasons, however, I concur in my colleagues' finding that the Agreement unlawfully interferes with NLRB charge filing in violation of NLRA Section 8(a)(1). In pertinent part, the Agreement requires employees to resolve by arbitration "any dispute between [the employee] and [the Respondent], except for claims for Workers' Compensation, Unemployment Compensation, or any other claim that is non-arbitrable under applicable state or federal law." The Agreement further states that "except for the claims carved out above," it covers "all . . . statutory claims."

For the reasons stated in my separate opinion in *The Rose Group d/b/a Applebee's Restaurant*, 363 NLRB No. 75, slip op. at 3–5 (2015) (Member Miscimarra, concurring in part and dissenting in part), I believe that an agreement may lawfully provide for the arbitration of NLRA claims, and such an agreement does not unlawfully interfere with Board charge filing, at least where the agreement expressly preserves the right to file claims or charges with the Board or, more generally, with administrative agencies.[12] Here, however, the Agreement does not qualify in any way the requirement that all statutory claims must be resolved in binding arbitration and in this manner only. There is no exception preserving employees' right to file charges with administrative agencies such as the NLRB. For these reasons, I join my colleagues in finding that the Agreement violates the Act by unlawfully restricting the filing of charges with the Board. See *U-Haul Co. of California*, 347 NLRB 375, 377 (2006), enfd. mem. 255 Fed. Appx. 527 (D.C. Cir. 2007); *Murphy Oil*, above, slip op. at 22 fn. 4 (Member Miscimarra, dissenting in part); *GameStop Corp.*, 363 NLRB No. 89, slip op. at 6–7 (Member Miscimarra, concurring in part and dissenting in part); *The Rose Group d/b/a Applebee's Restaurant*, above (Member Miscimarra, concurring in part and dissenting in part).

Accordingly, I respectfully dissent in part from, and I concur in part with, my colleagues' decision.

Dated, Washington, D.C. July 6, 2016

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Philip A. Miscimarra, Member

NATIONAL LABOR RELATIONS BOARD

APPENDIX A

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

[10] See, e.g., *Murphy Oil USA, Inc. v. NLRB,* above; *Johnmohammadi v. Bloomingdale's*, 755 F.3d 1072 (9th Cir. 2014); *D. R. Horton, Inc. v. NLRB*, above; *Owen v. Bristol Care, Inc.*, 702 F.3d 1050 (8th Cir. 2013); *Sutherland v. Ernst & Young LLP*, 726 F.3d 290 (2d Cir. 2013).

[11] *Murphy Oil USA, Inc. v. NLRB*, 808 F.3d at 1021.

[12] The Respondent contends that the Agreement's exclusion of claims that are "non-arbitrable under applicable state or federal law" places NLRA claims outside the Agreement's scope. To the contrary, the Board for decades has held that NLRA claims may lawfully be resolved in arbitration (although the Board, applying a deferential standard, retains the right to evaluate whether the resulting award is inconsistent with the Act). Indeed, the Board's decision in *Babcock & Wilcox Construction* leaves no doubt that NLRA claims can be made subject to a mandatory arbitration agreement. The Board majority in *Babcock* stated that, as a prerequisite to affording deference to any resulting arbitration award, the Board would require the parties to have "explicitly authorized" the arbitrator "to decide *the unfair labor practice issue*." 361 NLRB No. 132, slip op. at 5 (emphasis added). See *Ralph's Grocery Co.*, 363 NLRB No. 128, slip op. at 6–7 (2016) (Member Miscimarra, concurring in part and dissenting in part).

Choose not to engage in any of these protected activities.

WE WILL NOT maintain an arbitration agreement that employees reasonably would believe bars or restricts the right to file charges with the National Labor Relations Board.

WE WILL NOT maintain and/or enforce an arbitration agreement that requires employees to waive the right to maintain employment-related class or collective actions in all forums, whether arbitral or judicial.

WE WILL NOT in any like or related manner, interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL rescind the arbitration agreement in all of its forms or revise it in all of its forms to make clear that the arbitration agreement does not constitute a waiver of your right to maintain employment-related joint, class, or collective actions in all forums, and that it does not bar or restrict your right to file charges with the National Labor Relations Board.

WE WILL notify all current and former employees who were required to sign or otherwise become bound to the arbitration agreement in all of its forms that it has been rescinded or revised and, if revised, WE WILL provide them a copy of the revised agreement.

WE WILL notify the court in which Konny Renteria filed her collective lawsuit that we have rescinded or revised the arbitration agreement upon which we based our motion to dismiss her collective lawsuit and compel individual arbitration, and WE WILL inform the court that we no longer oppose Konny Renteria's collective lawsuit on the basis of that agreement.

WE WILL reimburse Konny Renteria and any other plaintiffs for any reasonable attorneys' fees and litigation expenses that they may have incurred in opposing our motion to dismiss the collective lawsuit and compel individual arbitration.

BRISTOL FARMS

The Board's decision can be found at http://www.nlrb.gov/case/21–CA–103030 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street SE Washington, D.C. 20570, or by calling (202) 273–1940.

APPENDIX B

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT maintain an arbitration agreement that employees reasonably would believe bars or restricts the right to file charges with the National Labor Relations Board.

WE WILL NOT maintain an arbitration agreement that requires employees to waive the right to maintain employment-related class or collective actions in all forums, whether arbitral or judicial.

WE WILL NOT in any like or related manner, interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL rescind the arbitration agreement in all of its forms or revise it in all of its forms to make clear that the arbitration agreement does not constitute a waiver of your right to maintain employment-related joint, class, or collective actions in all forums, and that it does not bar or restrict your right to file charges with the National Labor Relations Board.

WE WILL notify all current and former employees who were required to sign or otherwise become bound to the arbitration agreement in all of its forms that it has been rescinded or revised and, if revised, WE WILL provide them a copy of the revised agreement.

BRISTOL FARMS

The Board's decision can be found at http://www.nlrb.gov/case/21–CA–103030 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street SE Washington, D.C. 20570, or by calling (202) 273–1940.

Ami Silverman, Esq., for the General Counsel.
Matthew W. Gordon, Esq. (Mattern Law Group), for the Charging Party.
Denica E. Anderson and *Kimberly M. Talley, Esqs. (Sanchez & Amador, LLP),* for the Respondent.

DECISION

STATEMENT OF THE CASE

LISA THOMPSON, Administrative Law Judge. This is another case raising issues related to *D. R. Horton, Inc.*, 357 NLRB 2277 (2012), enf. granted in part and denied in part 737 F.3d 344 (5th Cir. 2013). It was tried in Los Angeles, California, on June 17 and 18, 2014. Konny Renteria (Renteria or the Charging Party) filed the original charge on April 18, 2013,[1] and filed an amended charge on August 22. The General Counsel issued the complaint November 19. Bristol Farms (the Respondent or Company), filed a timely answer, and later an amended answer, denying all material allegations and setting forth its affirmative defenses.

The complaint alleges that Respondent violated Section 8(a)(1) of the National Labor Relations Act (the Act), when, (1) by virtue of its written application for employment, Respondent required Renteria to be bound by its Mutual Agreement to Arbitrate (MAA); (2) Respondent enforced the MAA by filing a motion to compel arbitration of Renteria's class-action wage-and-hour lawsuit; and (3) Respondent maintained provisions of the MAA that interfere with employees' access to the Board and its processes.

On the entire record and after considering the briefs filed by the Acting General Counsel, the Charging Party, and the Respondent, I make the following.

[1] Abbreviations used in this decision are as follows: "Tr." for Transcript; "GC Exh." for General Counsel's Exhibit; "CP Exh." for Charging Party's Exhibit; "R. Exh." for Respondent's Exhibit; "Jt. Exh." for Joint Exhibit; "GC Br." for the General Counsel's brief; "CP Br." for the Charging Party's Brief; and "R. Br." for Respondent's brief.

FINDINGS OF FACT

I. JURISDICTION

Bristol Farms, a corporation with an office and place of business in Carson, California, is engaged in the operation of retail grocery stores. The parties stipulate and I find that it is an employer engaged in commerce within the meaning of Sections 2(2), (6), and (7) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Respondent and the Charging Party.

Respondent operates retail grocery stores in the State of California. It also operates a central kitchen, which, along with its corporate headquarters, is located in Carson, California.

Renteria was educated in Mexico, and though their school system does not align perfectly with the United States' education system, she attained the equivalent of a high school diploma. At the time of the hearing, she lived in the United States for about 15 years (since roughly 1999) but had not gone to school in the United States or taken any English classes.

B. Renteria's Application, Orientation, and Arbitration Agreement.

Renteria went to Bristol Farms' Carson facility and filled out an application for employment on November 14, 2006. The application contained a certification, which stated, in relevant part:

> I agree that any offer of employment with Bristol Farms is conditioned upon my entering into an arbitration agreement with Bristol Farms/Lazy Acres, pursuant to which all disputes that might arise out of my employment with Bristol Farms/Lazy Acres, whether during or after that employment, will be submitted to binding arbitration. I understand that consideration of my employment application is conditioned upon my agreement to arbitrate any employment-related dispute with Bristol Farms/Lazy Acres. I understand that this agreement does not alter my status (if hired) as an at-will employee.

(Jt. Exh. 2.) Upon submitting her application, Renteria attempted to speak with Manager Craig Gehr who did not speak Spanish. Gehr summoned Assistant Manager Juvenal Isidoro to translate. At the time, Renteria could speak some basic English though she did not read or understand English beyond a simple conversational level.

Joseph Reichard, a human resources recruiter for Respondent during this time period, was responsible for conducting new employee orientation. The orientation for central kitchen workers took 2 to 4 hours, part of which was spent reviewing and completing paperwork.[2] One of the paperwork items was a mutual agreement to arbitrate (MAA). (Jt. Exh. 4.) According to Reichard, his practice was to read the MAA aloud and tell the employees it was optional. He also told them that if they did not understand the MAA, they could take it with them and

[2] The orientation for employees in the retail stores is longer, lasting 5 to 7 hours.

have someone explain it.[3] The pertinent provisions of the MAA state:

> It is in the interest of Bristol Farms and its Owners/Partners that, whenever possible, disputes related to employment matters be resolved quickly and fairly. Should any matter remain unresolved, and in consideration of the promises below and your employment with Bristol Farms, you and Bristol Farms agree as follows:
>
> You and Bristol Farms agree that final and binding arbitration shall be the exclusive remedy for any dispute between you and Bristol Farms, except for claims of Workers' Compensation, Unemployment Compensation, or any other claim that is non-arbitrable under applicable state or federal law. Thus, except for claims carved out above, this Agreement includes all common-law and statutory claims, including but not limited to, any claim for breach of contract, unpaid wages, wrongful termination, and for laws forbidding discrimination, harassment, and retaliation on the basis of race, color, religion, gender, age, national origin, disability, and any other protected status. You understand that you are giving up no substantive rights, and this Agreement simply governs forum.

(Jt. Exh. 4.) The MAA then states that the arbitration will be conducted under the rules and procedures of the American Arbitration Association (AAA), and discusses how an arbitrator will be selected, along with the payment and fee structure. The MAA concludes by stating:

> *BY SIGNING THIS AGREEMENT, YOU AND THE COMPANY ACKNOWLEDGE THAT THE RIGHT TO A COURT TRIAL AND TRIAL BY JURY IS OF VALUE, AND KNOWINGLY AND VOLUNTARILY WAIVE SUCH RIGHT FOR ANY DISPUTE SUBJECT TO THE TERMS OF THIS AGREEMENT.*

(Id.) It is silent as to class action claims.

On November 20, 2006, Renteria signed a conditional job offer to work in Respondent's central kitchen as a meat cutter, at a pay rate of $12.50 per hour. (Jt. Exh. 3.) She began work on or about November 28, 2006, starting with an orientation from 9:30 to 12:15. (R. Exh. 5.) Reichard conducted the orientation, though at the time of the hearing he did not specifically recall Renteria being present. During Renteria's orientation, Reichard spoke English and gave her and the other attendees some papers, also in English, to sign. Renteria did not understand everything he was saying, but was under the impression she was to sign the documents given to her. (Tr. 142.) There was not a Spanish version of the MAA, or any of the other documentation, presented at the orientation. Renteria signed the MAA during her orientation on November 28.

Renteria worked in the central kitchen, cutting chicken and beef, and preparing pastas. She generally worked the morning shift, along with about 20 coworkers, supervised by Isidoro. The coworkers spoke to each other and to Isidoro in Spanish.[4]

[3] Reichard's practice was the same for the predesignation form, which was the only other optional form.

[4] Renteria was terminated in March 2012, for falsifying her timecard.

C. Respondent's Current Application and Orientation.

Since at least October 18, 2012, Respondent has used an application form that differs from the one Renteria completed. (Jt. Exh. 1, ¶ 6.) This application does not contain language conditioning employment upon entering into an arbitration agreement with Respondent. (Jt. Exh. 5.)

At the time of the hearing, Oquilla Jones was store director at Bristol Farms' Hollywood store. She began doing orientations in June 2013, and described her current practice. During orientation, she distributes forms from Human Resources. One of these forms is the mutual agreement to arbitrate (MAA), detailed above. At times, she or one of the participants will read the MAA during the orientation. She informs employees that the MAA is an optional form but does not explain what the ramifications are for choosing to sign it or not to sign it. She collects all the various orientation forms at the end of the orientation class, but if the employees want to consult with someone before turning in the MAA, they can turn it into Human Resources later. Jones maintains a checklist for each employee attending the orientation to verify that an employee has turned in his or her respective forms. She then returns the completed forms she collects to Human Resources. Not all employees sign the MAA, and Jones was not aware of any employee being terminated for failing to sign it.

D. Class Action Complaint and Response.

On August 28, 2012, Renteria, through her attorneys, filed a class action complaint in Superior Court for the State of California. The complaint alleged various claims regarding wages, including a claim under the California Private Attorney General Act of 2004 (PAGA). (Jt. Exhs. 1 ¶ 9(a), 7.) On April 2, 2012, Bristol Farms filed a motion to dismiss Renteria's class complaint, and to dismiss, or in the alternative, compel arbitration of Renteria's individual claims. Renteria responded and Bristol Farms replied. On May 30, 2012, Superior Court Judge Elihu M. Berle granted Bristol Farms' motion to compel arbitration, with the exception of her PAGA claim. (Jt. Exh. 11.) Judge Berle dismissed Renteria' class claims on December 9, 2012. (Jt. Exh. 12.)

E. Observations of Renteria's Communication Skills.

At all relevant times, Lynn Mellilo has been Respondent's senior director of asset management. She saw Renteria a couple times a week and spoke English with her. The regular conversations consisted of niceties, such as "Hello, how are you?" and "How is production today?" (Tr. 184.) They had one longer conversation where Mellilo told Renteria she liked her hat, and they discussed how she likes to wear color to liven up the uniform. Mellilo also spoke with Renteria in 2008, after she had fallen down and sustained an injury in the central kitchen. Mellilo visited Renteria at the hospital to follow up, asked her how she was feeling, whether there was anyone she needed to contact, the types of testing she was having, and the like. Mellilo never had any difficulty conversing with Renteria in English, though she recalled Renteria used basic words.

In late 2012/early 2013, Renteria worked as a deli clerk and bagger under the supervision of Paul Pewrdaza, store director of Sprouts Farmers' Market in San Pedro, California. Renteria

was required to communicate with customers in English for both positions, and he never witnessed her having trouble. He had known her about a year-and-a-half at the time of the hearing.

III. DECISION AND ANALYSIS

The complaint asserts violations of Section 8(a)(1) of the Act. Under Section 8(a)(1), it is an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7 of the Act. The rights guaranteed in Section 7 include the right "to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. . . ."

In *D. R. Horton*, slip op. at 1, the Board explained that an employer violates Section 8(a)(1) of the Act by imposing, as a condition of employment, a mandatory arbitration agreement that precludes employees from "filing joint, class, or collective claims addressing their wages, hours, or other working conditions against the employer in any forum, arbitral or judicial." Citing to *Spandsco Oil & Royalty Co*., 42 NLRB 942, 948–949 (1942), *Salt River Valley Water Users Assn.*, 99 NLRB 849, 853–854 (1952), enfd. 206 F.2d 325 (9th Cir. 1953), and a string of other cases, the Board noted that concerted legal action addressing wages, hours, and working conditions has consistently fallen within Section 7's protections.

A. Renteria's Agreement and Respondent's Enforcement.

Paragraphs 4, 5(b), and 7 of the complaint allege that Respondent violated Section 8(a)(1) of the Act by maintaining the MAA as a condition of the Charging Party's employment, and enforcing it to require individual arbitration of her wage-related claims.

First, I must address whether the MAA was a mandatory condition of Renteria's employment. It is hard to imagine language more clear than the language in Renteria's job application, articulated above and reiterated here:

> I agree that any offer of employment with Bristol Farms is conditioned upon my entering into an arbitration agreement with Bristol Farms/Lazy Acres, pursuant to which all disputes that might arise out of my employment with Bristol Farms/Lazy Acres, whether during or after that employment, will be submitted to binding arbitration. I understand that consideration of my employment application is conditioned upon my agreement to arbitrate any employment-related dispute with Bristol Farms/Lazy Acres. I understand that this agreement does not alter my status (if hired) as an at-will employee.

Clearly, Renteria's employment, by virtue of this clear and unambiguous language, was conditioned upon her agreement to arbitrate "any employment related dispute" with Bristol Farms. I therefore find the agreement was a mandatory rule imposed by Respondent.[5]

Respondent introduced testimony that the employees were orally told, at orientation, that signing the agreement was voluntary. Where language is unambiguous, as here, "Board precedent prohibits the use of parole evidence to vary the terms of the parties' agreement." *Contek International*, *Inc.,* NLRB 879, 884 (2005) (citing *Quality Building Contractors*, 342 NLRB 429 430 (2004); and *NDK Corp*., 278 NLRB 1035 (1986)). Respondent points out that the MAA itself ends by stating the employee is knowingly and voluntarily waiving the right to go to court. The consideration for knowingly and voluntarily giving up this right, however, was (clearly and unambiguously) employment with Respondent. I therefore apply the parole evidence rule and decline to consider testimony that Renteria was told signing the agreement was voluntary.[6]

Respondent further argues that the employment application did not incorporate the MAA because it did not specifically reference it. I have considered the cases Respondent cited in its brief, yet none address the situation present here. Simply put, Respondent required Ms. Renteria to sign an application with a provision agreeing that any offer of employment was conditioned upon entering into an arbitration agreement with Bristol Farms. It then presented her with one, and only one, arbitration agreement at her orientation. Respondent's laborious arguments that somehow the former does not incorporate the latter in the present context fall flat in light of the plain language of the documents. Moreover, it is "a cardinal principle of contract construction that a document should be read to give effect to all its provisions and to render them consistent with each other." *Mastrobuono v. Shearson Lehman Hutton, Inc*., 514 U.S. 52, 63 (1995). The provision on the application conditioning employment on signing an arbitration agreement has no effect if, in fact, there is no such condition.

As a mandatory condition of Renteria's employment, as well as those employees who went through the same application and orientation process, the MAA is evaluated in the same manner as any other workplace rule. *D. R. Horton*, supra, slip op. at 5.[7] When evaluating whether a rule, including a mandatory arbitration agreement, violates Section 8(a)(1), the Board applies the test set forth in *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004). See *U-Haul Co. of California*, 347 NLRB 375, 377 (2006), enfd. 255 Fed.Appx. 527 (D.C. Cir. 2007); *D. R. Horton*, supra. Under *Lutheran Heritage*, the first inquiry is whether the rule explicitly restricts activities protected by Section 7. If it does, the rule is unlawful. If it does not, "the viola-

[5] Respondent does not explicitly argue a timeliness defense. Any such argument would lack merit under controlling case law holding that a continuing violation exists as long as the rule is still being enforced at the time of the charge. See *American Cast Iron Pipe Co*., 234 NLRB 1126 fn. 1 (1978); *Alamo Cement Co*., 277 NLRB 1031, 1036–1037 (1985) (no time bar where enforcement allegation could not have been litigated sooner); *The Guard Publishing Co*., 351 NLRB 1110, 1110, fn. 2 (2007) ("maintenance during the 10(b) period of a rule that transgresses employee rights is itself a violation of Sec. 8(a)(1).")

[6] Even if parole evidence was admissible, my decision would not change. Reichard did not specifically remember Renteria in an orientation class, and given her limitations with English, I do not think she understood that signing the MAA was voluntary. Rather, when faced with a stack of papers to sign at orientation, she understood she was to sign them.

[7] Respondent claims the MAA is not a work rule because it is voluntary. For the reasons set forth in this decision, I disagree.

tion is dependent upon a showing of one of the following: (1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to [Section 7] activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights." *Lutheran Heritage* at 647.

I find the MAA violates Section 8(a)(1) because employees would reasonably construe its language to prohibit Section 7 activity and because it has been applied to restrict the exercise of Section 7 rights.

Respondent contends that the MAA is distinguishable from the agreement the Board found unlawful in *D. R. Horton* because it does not contain an express waiver of class and collective actions. Clearly, however, Respondent has applied the MAA to restrict the Charging Party from proceeding with a class action complaint. Indeed, in its motion to dismiss Renteria's class action complaint, the first paragraph in Respondent's statement of facts contains the following heading: "The Parties Entered Into An Enforceable Agreement Requiring Plaintiff To Resolve Her Claims Through Binding Individual Arbitration." (Jt. Exh. 8.) Later, citing to the Supreme Court's decision in *Stolt-Nielsen S.A. v. Animal Feeds Int'l Corp*., 130 S.Ct. 1758, 1775–1776 (2010), Respondent argued, successfully, that a party may not be compelled to submit to class arbitration where the agreement is silent as to its permissibility. In its motion to dismiss, Respondent emphasized the singular language of the MAA as being between the individual employee and Bristol Farms, to support its argument that MAA does not authorize class action arbitrations. (Id.) Respondent's attempt to have it both ways is disingenuous. Rather, Respondent construed the singular language of the MAA as prohibiting class arbitration, and I agree that this language, with no reference to the ability to pursue claims about working conditions jointly, would lead an employee to read the MAA as applicable to individual employment disputes. Moreover, it was clearly applied to restrict Renteria's Section 7 activity of pursuing a class action lawsuit regarding wages.

Respondent also asserts that even if the MAA was mandatory, it did not violate the Act, because the use of class action procedures is not a substantive right. The Board, however, has found that participation in a class action is a substantive right protected by Section 7. Respondent further argues that, absent a congressional command to excuse enforcement of the FAA, it must be enforced. Relying on *CompuCredit Corp. v. Greenwood*, 132 S.Ct. 665, 672 fn. 4 (2012), decided a week after *D. R. Horton*, Respondent argues that the Board ignored the requirement of a "congressional command" to override the FAA. The crux of Respondent's argument is that nothing in Section 7 (which was enacted prior to the FAA) excuses application of the FAA. Specifically, Respondent argues that Section 7 provides no substantive right to initiate a class action. Though the Board could not have applied *CompuCredit* when it issued *D. R. Horton*, it nonetheless addressed this argument, stating:

> Any contention that the Section 7 right to bring a class or collective action is merely "procedural" must fail. The right to engage in collective action—including collective *legal* action—is the core substantive right protected by the NLRA and is the foundation on which the Act and Federal labor policy rest. [Emphasis in original.]

D. R. Horton, supra.[8]

Respondent also asserts that the Board's ruling in *D. R. Horton* interferes with the Federal Arbitration Act (FAA), 9 U.S.C. §§ 1 *et. seq*., based on the Supreme Court's reasoning both in *AT&T Mobility v. Concepcion*, 131 S.Ct. 1740, 1746 (2011), *Stolt-Nielsen S.A. v. Animal Feeds Int'l Corp*., 130 S.Ct. 1758, 1775–1776 (2010), and *Gilmer v. Interstate/Johnson Lane Corp*., 500 U.S. 20, 24 (1991). The Board, however, considered these arguments and precedents in *D. R. Horton* to support a different conclusion, by which I am bound.

Respondent argues that the recent Supreme Court decision, *American Exp. Co. v. Italian Colors Restaurant*, 133 S.Ct. 2304 (2013), makes clear that it is improper to find a congressional command where none exists. *American Exp. Co.* involved a group of merchants who were unhappy with the rates American Express charged them to use their cards at their respective businesses.[9] At issue before the Court was whether the merchants were bound by agreements mandating individual arbitration of these disputes and precluding a class action suit for violation of antitrust law. The merchants argued that without the ability to proceed collectively, it was not cost-effective to challenge American Express's rates. The Court noted that the laws at issue, the Sherman and Clayton Acts, fail to reference class actions, and found that the "antitrust laws do not guarantee an affordable procedural path to the vindication of every claim." Id. at 2309. The Board in *D. R. Horton* distinguished the NLRA, however, and found that Section 7 substantively guarantees employees the right to engage in collective action, including collective legal action, for mutual aid and protection concerning wages, hours, and working conditions. As such, I find Respondent's argument fails.

Next, relying on *Bill Johnson's v. NLRB*, 461 U.S. 731, 741 (1983), and *BE & K Construction*, 536 U.S. 516 (2002), Respondent argues that the motion to compel arbitration is constitutionally protected by the First Amendment. I find that instant case falls within the exception set forth in *Bill Johnson's* at footnote 5, which states in relevant part:

> It should be kept in mind that what is involved here is an employer's lawsuit that the federal law would not bar except for its allegedly retaliatory motivation. We are not dealing with a suit that is claimed to be beyond the jurisdiction of the state

[8] Respondent notes that the Board's refusal to permit a class action waiver is contrary to the Supreme Court's decision in *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247 (2009). The Board considered this argument, however, and distinguished *14 Penn Plaza*. *D. R. Horton,* supra at 12.

[9] It is a matter of common sense that the merchants could continue to operate their businesses without offering customers the ability to pay with an American Express card. Other forms of currency are available and using American Express was their choice. Likewise, it was the Charging Party's choice to work for Ralph's. Taken to its logical extreme, however, if waivers such as the MBAP are judicially sanctioned and become the norm for employers, employees will increasingly be faced with the option of foregoing class litigation for mutual aid and protection or not working.

> courts because of federal-law preemption, or a suit that has an objective that is illegal under federal law. Petitioner concedes that the Board may enjoin these latter types of suits. Brief of Petitioner 12-13, 20; Reply Brief for Petitioner 8. Nor could it be successfully argued otherwise, for we have upheld Board orders enjoining unions from prosecuting court suits for enforcement of fines that could not lawfully be imposed under the Act, see *Granite State Joint Board, Textile Workers Union*, 187 N.L.R.B. 636, 637 (1970), enforcement denied, 446 F.2d 369 (CA1 1971), rev'd, 409 U.S. 213, 93 S.Ct. 385, 34 L.Ed.2d 422 (1972); *Booster Lodge No. 405, Machinists & Aerospace Workers*, 185 N.L.R.B. 380, 383 (1970), enforced in relevant part, 148 U.S.App.D.C. 119, 459 F.2d 1143 (1972), aff'd, 412 U.S. 84, 93 S.Ct. 1961, 36 L.Ed.2d 764 (1973), and this Court has concluded that, at the Board's request, a District Court may enjoin enforcement of a state-court injunction "where [the Board's] federal power preempts the field." *NLRB v. Nash-Finch Co.*, 404 U.S. 138, 144, 92 S.Ct. 373, 377, 30 L.Ed.2d 328 (1971).

The Board has determined that these exceptions apply in the wake of *Bill Johnson's* and *BE & K Construction*. See, e.g., *Allied Trades Council (Duane Reade Inc.)*, 342 NLRB 1010, 1013, fn. 4 (2004); *Teamster's, Local 776 (Rite Aid Corp.)*, 305 NLRB 832, 835 (1991). Moreover, particular litigation tactics may fall within the exception even if the entire lawsuit may not be enjoined. *Wright Electric, Inc.*, 327 NLRB 1194, 1195 (1999), enfd. 200 F.3d 1162 (8th Cir. 2000); *Dilling Mechanical Contractors, Inc*, 357 NLRB 544 (2011). As such, since the Board has concluded in *D. R. Horton* that precluding class or collective actions related to wages, hours, and/or working conditions is unlawful, Respondent's attempt to enforce the MAA in state court by moving to compel individual arbitration fall within the unlawful objective exception in *Bill Johnson's*.

Based on the foregoing, I find the MAA violates Section 8(a)(1) of the Act as alleged in complaint paragraphs 4, 5(b), and 7.[10]

B. Implementation and Maintenance of Arbitration Agreements for Other Employees.

Complaint paragraphs 5(a) and 7 allege that Respondent violated Section 8(a)(1) of the Act when, at all times since at least October 18, 2012, it implemented and maintained a mutual agreement to arbitrate which contains provisions requiring employees to resolve certain employment disputes through arbitration.

The first question that needs to be addressed is whether the MAA was voluntary for those employees who filled out the online application that did not contain language conditioning their employment on signing an arbitration agreement. This is because the Board in *D. R. Horton* expressly declined to answer the "more difficult" question of:

> [W]hether, if arbitration is a mutually beneficial means of dispute resolution, an employer can enter into an agreement that is not a condition of employment with an individual employee to resolve either a particular dispute, or all potential employment disputes through a non-class arbitration rather than litigation in court.

D. R. Horton, supra at fn. 28.

Respondent relies on evidence that, at orientation, employees were told the MAA was optional and they could take it home with them and seek advice if they were not clear about its terms. Respondent also provided unrefuted testimony that not all employees signed the agreement, and no employees have been terminated for failing to sign the agreement.

What is troubling, however, is that the document itself does not mention that it is optional, and there is nothing in writing giving employees either the opportunity to "opt in" or "opt out" of the MAA. Instead, it is presented as one of many documents to sign at a lengthy orientation. Orally, reading the terms of the MAA and orally informing employees that they are not required to sign the MAA, while the terms of the agreement do not state it is optional, creates unnecessary confusion. The employees are not told the ramifications of signing the MAA or not signing it. Moreover, there is a checklist for each employee that denotes which documents that employee has signed at the completion of orientation. Under these circumstances, I find a reasonable employee would be coerced into signing the MAA.

Respondent cites to several cases where courts have held that opt-out provisions render arbitration agreements voluntary. In these cases, however, the option to opt out of the agreement was apparent from the document itself. There is no such provision in the MAA at issue here.[11]

Accordingly, for the reasons set forth with regard to Renteria's agreement, I find the MAA violates the Act as alleged in paragraphs 5(a) and (7) of the complaint.

C. Effect on Employees' Access to Board and its Procedures.

Finally, the complaint alleges, at paragraphs 6 and 7, that employees would reasonably conclude that the provisions of the MAA interfere with employees' access to the Board and its processes, in violation of Section 8(a)(1).

In evaluating the impact of a rule on employees, the appropriate inquiry is whether the rule would reasonably tend to chill employees in the exercise of their Section 7 rights. *Lafayette Park Hotel,* 326 NLRB 824, 825 (1998), enfd. 203 F.3d 52 (D.C. Cir. 1999). A rule does not violate the Act if a reasonable employee merely *could* conceivably read it as barring Section 7 activity. Rather, the inquiry is whether a reasonable employee *would* read the rule as prohibiting Section 7 activity. *Lutheran Heritage,* supra. The Board must give the rule under consideration a reasonable reading and ambiguities are construed against its promulgator. *Lutheran Heritage*, supra at 647;

[10] Respondent argues that Renteria is not credible. As my findings do not rest on credibility, I decline to address these arguments. On a related note, however, I do not find persuasive the evidence Respondent presented about Renteria's ability to understand English beyond a basic level in 2006. Evidence of her engaging in conversation during subsequent years does not call into question her unrefuted testimony that her understanding of English was imperfect in 2006.

[11] For this same reason, Respondent's argument based on the nonprecedential administrative law judge decision in *Bloomingdale's, Inc.*, 2013 WL 3225945 (June 25, 2013), also fails.

Lafayette Park Hotel, 326 NLRB at 828; and *Cintas Corp. v. NLRB*, 482 F.3d 463, 467–470 (D.C. Cir. 2007). Moreover, the Board must "refrain from reading particular phrases in isolation, and it must not presume improper interference with employee rights." *Lutheran Heritage* supra at 646.

I find a reasonable employee would read the MAA as prohibiting him or her from filing unfair labor practice charges with the Board. On its face, the MAA applies to "any dispute between you and Bristol Farms" with specific exceptions for "Workers' Compensation, Unemployment Compensation, or any other claim that is non-arbitrable under applicable state or federal law." Notably, the MAA does not specifically mention an employees' right to file charges with the Board in its exceptions or elsewhere. Moreover, it expressly encompasses claims for "wrongful termination" as well as "discrimination" based on any "protected status." Thus a reasonable employee would read this to require arbitration for claims of termination based on union or other protected concerted activity, and for claims of discrimination based on the protected status of having engaged in union activity or other protected concerted activity. While the MAA contains a catchall provision excluding "any other claim that is non-arbitrable under applicable state or federal law" this at best creates an ambiguity, which is construed against the Respondent as the MAA's drafter. *Lafayette Park Hotel*, 326 NLRB at 828; *Cintas Corp. v. NLRB*, 482 F.3d 463, 467–470 (D.C. Cir. 2007).

Respondent's argument that, under certain circumstances, the Board has permitted waiver of the right to file charges with the Board, is unavailing. To support its argument, Respondent cites to *BP Amoco Chemical*, 351 NLRB 614 (2007), where the Board found termination agreements that 37 employees signed, which waived their right to file charges with the Board, were valid. In that case, the terminated employees received enhanced severance packages in return for their agreement not to bring legal action against their former employer for any employment-related issues. Unlike in the instant case, the former employees of *BP Amoco Chemical* were being separated from the company, so the waiver was not for potential prospective violations. More importantly, the Board in *BP Amoco Chemical* weighed the factors set forth in *Independent Stave*, 287 NLRB 740 (1987), and found the former employees "were aware of the content, advised of the meaning, and knew that they were waiving and releasing claims." 351 NLRB at 615. Based on the analysis in the paragraph directly above, the situation here is far less clear, and is therefore *BP Amoco Chemical* is meaningfully distinguishable.

D. Board Quorum and Appointment of Regional Director

Finally, I will address separately Respondent's argument that the complaint at issue here was improperly issued because Regional Director Olivia Garcia was appointed at a time when the Board lacked a quorum. As the Board stated in *Pallet Cos.*., 361 NLRB No. 33, slip op. at 1 (August 27, 2014):

> Agency staff engaged in the investigation and prosecution of unfair labor practices are directly accountable to the General Counsel. 29 U.S.C. § 153(d); See *NLRB v. United Food & Commercial Workers Union, Local 23*, 484 U.S. 112, 127-128 (1987); *NLRB v. FLRA,* 613 F.3d 275, 278 (D.C. Cir. 2010). When a Regional Director or other designated Board agent issues a complaint, he acts for, and with authority delegated by, the General Counsel. *United States Postal Service*, 347 NLRB 885, 886 (2006); *Roadway Express,* Inc., 355 NLRB 197, 206 (2010).

Respondent does dispute that the complaint here was issued in the General Counsel's name and under his authority.

In any event, in light of the Supreme Court's decision in *NLRB v. Noel Canning*, *a Division of the Noel Corp.*, 134 S.Ct. 2550 (2014), it appears the Board had a quorum at the time of the complaint, consisting of Members Hayes, Pearce and Becker. Respondent does not contest the validity of Members Hayes and Pearce's appointments. In *NLRB v. New Vista Nursing & Rehabilitation*, 719 F.3d 203, 218 (3d Cir. 2013), the Third Circuit found that Member Becker's appointment was invalid because it occurred during a 17-day intrasession Senate recess. In *Noel Canning*, however, the Court held that the President's constitutional recess appointment authority extended to intrasession recesses of the Senate. Moreover, the Court's analysis suggests that recess appointments are valid if, among other criteria, the recess lasted 10 days or longer. I find, therefore, that the Board had a quorum at the time the complaint was issued. I further find that the Board had a quorum when *D. R. Horton* was decided by a panel consisting of Members Hayes, Pearce and Becker.

IV. CONCLUSIONS OF LAW

(1) Respondent, Bristol Farms, is an employer within the meaning of Section 2(6) and (7) of the Act.

(2) Respondent violated Section 8(a)(1) of the Act by maintaining and enforcing a mandatory mutual agreement to arbitrate (MAA), and enforcing that agreement by moving to compel individual arbitration of the Charging Party's class-action lawsuit pertaining to wages.

(3) Respondent violated Section 8(a)(1) of the Act by maintaining mutual agreement to arbitrate that employees reasonably would believe bars or restricts their right to file charges with the National Labor Relations Board.

REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

As I have concluded that the MAA is unlawful, the recommended order requires that Respondent revise or rescind it and advise its employees in writing that said rule has been so revised or rescinded. Because Respondent utilized the MAA on a corporate wide basis, Respondent shall post a notice at all locations where the MAA, or any portion of it requiring all employment-related disputes to be submitted to individual binding arbitration, was in effect. See, e.g., *U-Haul Co. of California*, supra, fn. 2 (2006); *D. R. Horton,* supra, slip op. at 17.

I recommend Respondent be required to reimburse Charging Party Renteria for any litigation and related expenses, with interest, to date and in the future, directly related to Respondent's filing its motion to compel arbitration in Case No. BC491186 in the Superior Court of California. Determining

the applicable rate of interest on the reimbursement will be as outlined in *New Horizons*, 283 NLRB 1173 (1987) (adopting the Internal Revenue Service rate for underpayment of Federal taxes). Interest on all amounts due to Ms. Renteria shall be computed on a daily bases as prescribed in *Kentucky River Medical Center*, 356 NLRB 8 (2010).

The General Counsel requests that Respondent be required to move the Superior Court of Los Angeles County, jointly with the Charging Party on request, to vacate its order compelling arbitration if a motion to vacate can still be timely filed. The law does not require the employer to permit class action arbitrations. Instead, *D. R. Horton* states that a forum for class or collective claims must be available. It is therefore beyond my authority to require Respondent to permit classwide arbitration. Instead, the employees must be permitted to proceed with class action claims regarding wages, hours and/or working conditions in some forum, whether arbitral or judicial.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended.[12]

ORDER

Respondent, Bristol Farms, Carson, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining a mutual agreement to arbitrate that employees would construe as prohibiting class or collective actions;

(b) Enforcing the mutual agreement to arbitrate to prohibit class actions;

(c) Maintaining a mutual agreement to arbitrate that restricts employees' protected activity or that employees reasonably would believe bars or restricts their right to file charges with the National Labor Relations Board.

2. Take the following affirmative action necessary to effectuate the policies of the Act

(a) Rescind or revise the mutual agreement to arbitrate to make it clear to employees that the agreement does not constitute a waiver in all forums of their right to maintain employment-related class or collective actions, and that the agreement does not bar or restrict their right to file charges with the National Labor Relations Board.

(b) Notify the employees of the rescinded or revised agreements to include providing them copies of the revised agreements or specific notification that the agreements have been rescinded.

(c) Within 14 days after service by the Region, post at its facility in Carson, California, and in all facilities where it has maintained and/or enforced the mutual agreement to arbitrate, copies of the attached notice marked "Appendix."[13] Copies of the notice, on forms provided by the Regional Director for Region 21, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since June 2011.

(d) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C., October 17, 2014

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT maintain or enforce a mutual agreement to arbitrate that requires all employment-related disputes to be submitted to individual binding arbitration.

WE WILL NOT enforce a mandatory arbitration program by requiring Charging Party Konny Renteria to agree to the mutual agreement to arbitrate.

WE WILL NOT enforce a mandatory arbitration program by asserting it in class-action litigation regarding wages the Charging Party Konny Renteria brought against us.

WE WILL NOT maintain a mandatory arbitration policy that employees reasonably would believe bars or restricts their right to file charges with the National Labor Relations Board.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Federal labor law.

WE WILL rescind or revise the mutual agreement to arbitrate to make it clear to employees that the agreement does not con-

[12] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[13] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

stitute a waiver of their right in all forums to maintain class or collective actions and does not restrict employees' right to file charges with the National Labor Relations Board.

WE WILL notify employees of the rescinded or revised mandatory arbitration program, including providing them with a copy of any revised agreements, acknowledgement forms or other related documents, or specific notification that the agreement has been rescinded.

WE WILL reimburse Charging Party Konny Renteria for any litigation expenses: (i) directly related to opposing the Respondent's Motion to Compel Arbitration; and/or (ii) resulting from any other legal action taken in response to Respondent's efforts to enforce the arbitration agreement to require individual arbitration.

WE WILL ensure the Charging Party Konny Renteria has a forum to litigate her class complaint by either moving the Superior Court of Los Angeles County, jointly with the Charging Party upon request, to vacate its order compelling arbitration, or permitting her claims to be arbitrated on a class-wide basis

BRISTOL FARMS

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/21–CA–103030 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273–1940.